Oregon Department of Agriculture response to EPA Issue Paper: "Non-Cropland" as a Use Site December 30, 2011

Question 1: Should EPA allow the use of "non-crop" terms on pesticide labels or should the Agency require more specific use sites?

The Oregon Department of Agriculture (ODA) advises EPA to avoid using the term "non-crop" or "noncrop" on pesticide labels because of the lack of consistency in what the term means and because it is ambiguous. This term has been so widely interpreted by some to mean anything but an agricultural food crop. On some pesticide labels, the term non-crop includes ditches (both drainage and irrigation), riparian areas, non-planted areas along the perimeter of agricultural fields, turf areas, areas under potted plants at commercial nurseries, etc. It has become a "catch-all" term that can be used to justify off-label uses.

Definition of Non-cropland

It is our understanding that the only definition or narrative description that EPA currently has for non-cropland is from the Criteria and Policy notice of 4/16/1979. Non-cropland is broadly defined as "any land on which agricultural product crops have not been planted and will not be planted during the current growing year and to which the pesticide applied will not result in injury to or illegal residue in any crop planted in the following years." "Conversely, cropland is any land that is used for crop production during the season of treatment or at any time while the chemical remains in the soil at a level which could result in injury to plants or which could result in illegal residue in plants. This would include grazing as well as cultivated cropland."

Specific use patterns for "noncrop" are listed in 40 CFR 161 Appendix A, Site Group 10. However, noncrop is combined with "wide area and general indoor/outdoor treatments", which makes it difficult for state regulators to distinguish what exactly should be listed under "noncrop". It is highly unlikely that pesticide users refer to 40 CFR 161 Appendix A for guidance, which limits its regulatory use by state agencies (plus the label should provide adequate clarity of approved sites).

Requirement - Specific Use Sites

Yes, the agency should require more specific use sites. It should be clearly indicated on the label the specific areas to be included. For example, an initial filter could be if it is a use covered under WPS, such as on Christmas trees, then do not include the site under non-crop.

For a number of years, there has been an ongoing classification of food crop-related sites into concise Crop Groups by EPA, IR-4 and others. For example EPA has even classified “agricultural drainage system” as “AQUA FOOD” Crop Group 99. If the agency makes the decision to retain the term non-crop, it is highly recommended that EPA develop various non-crop groups (with different data requirements) similar to the Crop Groups that have been developed. The Non-crop Group should be specified on the label, along with the specific use sites.

Question 2: What should EPA and/or other stakeholders do to prevent misinterpretation of “non-crop” terminology?

If EPA does elect to continue to use the term non-crop, EPA should:

(1) Develop a PR Notice indicating specific areas that are included under non-crop, such as rights-of-way, fencerows, and industrial facilities. Also indicate which sites are not included under non-crop, such as managed turf areas (including residential lawns and school grounds), and areas that are considered cropland, such as rangeland, CRP, Christmas trees and forests. Clarify if non-crop use would include use along manmade ditches and natural waterways, and in riparian areas.
(2) Develop educational materials, and train EPA staff (both OPP and OECA), registrants and state lead agencies.
(3) Include this as a PREP topic.

The Oregon Department of Agriculture (ODA) believes that three specific areas in particular need clarification. These are:

<u>Unplanted Field Perimeters</u>

Consistent classification of unplanted perimeter areas of fields can be difficult to define without written guidance, and pesticides labeled for non-crop can be inappropriately applied. EPA should clarify that perimeter areas of a field managed the same as the crop in the field (plowed/tilled and treated with crop pesticides) should not be also jointly classified as non-crop areas. These areas are essentially being treated as cropland, except when the pesticide user wants to use a pesticide in which the crop is not on the label, but non-crop is a listed site. Agricultural cropland essentially becomes temporarily categorized during the same growing season as non-cropland.

There are field border areas and fencerows which are not managed similar to the crop, and we agree that these areas can be legitimately treated with pesticides labeled for non-crop use, if the pesticide will not drift or otherwise result in illegal pesticide residues or injury to the nearby crop.

Ditches

Often on pesticide labels, “ditches” are placed under non-crop. This is in error because agricultural drainage and irrigation ditches are listed in 40 CFR 161 Appendix A, under Site Group 9 (Aquatic Sites), not Site Group 10 (“Noncrop, Wide Area and General indoor/Outdoor Treatments”).

We have seen some improvement on recent labels. On these improved labels it is clear whether the ditch is an irrigation ditch or a drainage ditch, and whether the ditch is dry or contains water. Occasionally, if the product can be applied to a dry irrigation ditch or canal (terms are often used interchangeably), the label will specify when irrigation water can be introduced into the ditch/canal. However, most labels simply indicate “ditches” or “ditchbanks” with no restrictions, and therefore that is how it is applied – without restrictions!

Sometimes the ditch or canal water flows into “waters of the state”, or supports aquatic life. It is often unknown to the user or state regulators whether fish and other aquatic organisms may be negatively impacted. It is ODA’s understanding that certain aquatic data are required if ditches are a listed site on a label; however, especially for older active ingredients, it is unclear to ODA how much supporting data have been submitted.

An additional complication is, if irrigation ditchbanks or dry irrigation ditches are treated, what is the potential for irrigated crops to be injured or have an unacceptable pesticide residue level?

Along Waterways

Pesticides labeled for non-crop use are also used on the banks of natural waterways, and in riparian areas and vegetative filter strips. Was this EPA’s intent? Many of these riparian areas and filter strips have been planted to improve water quality and it is not unusual to have one or more federal agencies involved (including providing project funding). Some growers, such as those who apply synthetic pyrethroids, construct and maintain these filter strips because it is a pesticide label requirement. Part of maintaining a filter strip is to control any noxious or invasive weeds. Because these sites are rarely on a label, growers and governmental agencies involved with noxious and/or invasive weed control resort to using a pesticide labeled for non-crop use.

Question 3: What should be the focus of Agency risk assessments and what data requirements should be applied to products that use the term "non-crop" on the label without any further limiting language?

Water Quality and Aquatic Life

The potential to impact water quality and aquatic species should be one of the primary focuses when assessing pesticides and sites to which they can be safely applied. This is especially important if use under the non-crop category will allow applications in riparian areas, filter strips, agricultural drainage and irrigation ditches, and along naturally occurring waterways. In addition, there is a potential to impact water quality and aquatic organisms when making rights-of-way applications; this is especially of concern if ditches next to roads contain water at the time of application, or if there is a significant rain event soon after an application.

It will be essential to address the potential for pesticide residues to enter waterways though drift or runoff, and assess any possible impacts to fish and aquatic invertebrates.

Potential to Impact Agricultural Crops - Fallow Land

Another focus should be whether the use has the potential to affect crops (phytotoxicity or residue levels) planted back into these areas, and whether it is appropriate to list fallow land under non-crop.

"Fallow land" is listed as a specific use pattern under 40 CFR 161 Appendix A, Site Group 10 "Noncrop, wide area and general indoor/outdoor treatments", and is often listed under "non-crop" on pesticide labels. This appears to be a contradiction to EPA's own definitions and the Residue Chemistry Test Guidelines, where "fallow land" is identified as a type of cropland. We believe that fallow land should not be listed under non-crop.

According to EPA's Terminology Reference System, "fallow area" is land area normally used for crop production but left unsown for one or more growing seasons. There is also a definition on EPA's website for "fallow land arable". It is defined as land not under rotation that is set at rest for a period of time ranging from one to five years before it is cultivated again, or land usually under permanent crops, meadows or pastures, which is not being used for that purpose for a period of at least one year. Arable land which is normally used for the cultivation of temporary crops but which is temporarily used for grazing is included (Source: ECEST). It is highly unlikely that many growers know EPA's definition for fallow area. ODA suggests that this term and any restrictions be better defined on labels, and that EPA to reconsider whether fallow land should be in Site Group 10.

The Residue Chemistry Test Guidelines OPPTS 860.1000, provide guidance regarding the use of pesticides on fallow land and data requirements: “Use of a pesticide on fallow land requires data indicating whether residues persist in soil long enough for uptake by crops. Fallow land uses must include a time limitation on planting to food/feed crops or tobacco. Twelve months is the longest time interval deemed practical for a fallow land use restriction. If residues persist in soil and are taken up by food/feed crops for the length of the time of planting limitation, or 12 months (whichever is shorter), a petition for tolerance for all crops which could be planted on the fallow land will be required. Additional guidance is provided in OPPTS 860.1850 and 860.1900.” Are these standards always being adhered to when allowing non-crop (fallow) on a pesticide label?

In Summary

The Oregon Department of Agriculture advises EPA to avoid using the term “non-crop” or “noncrop” on pesticide labels because of the lack of consistency in what the term means and because it is ambiguous.

However, if EPA does decide to continue to use the term “non-crop”, then EPA should:

(1) Develop various non-crop groups (with different data requirements) similar to the Crop Groups that have been developed.

(2) Clearly indicate specific use sites on the label (under the broad heading of non-crop).

(3) Educate EPA staff, registrants and State Lead Agencies on the definition of non-crop.